

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

SHERMAN COLLEGE OF STRAIGHT
CHIROPRACTIC¹

Employer

and

Case No. 11-RC-6618

COMMUNICATION WORKERS OF AMERICA,
LOCAL 3716

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer, Sherman College of Straight Chiropractic, is a private, non-profit South Carolina corporation located in Spartanburg, South Carolina, where it is engaged in the operation of an educational institution for chiropractic studies. The Petitioner, Communication Workers of America, Local 3716, filed a petition with the National Labor Relations Board seeking to represent a unit comprised of all full-time and regular part-time faculty, including instructional faculty, clinical faculty, and the health clinic faculty, employed by the Employer at its Spartanburg, South Carolina, location; but excluding managers, and guards and supervisors as defined in the Act.² A hearing officer of the Board held a hearing and the parties filed briefs with the undersigned.

As evidenced at hearing and in the parties' briefs, the sole issue is whether the Employer's faculty members are managerial employees who are excluded from the coverage of

¹ The name of the Employer appears as amended at hearing.

² There is no collective bargaining history between the parties.

the Act. The burden of proving that the faculty members are managers lies with the party seeking their exclusion. See *Montefiore Hospital & Medical Center*, 261 NLRB 569, 572 fn. 17(1982). While the parties agree that the standard to be applied is that set forth by the Court in *NLRB v. Yeshiva University*, 444 U. S. 672 (1980), the parties disagree upon whether the facts establish that the faculty members are managerial. The Employer contends that, as set forth in its faculty handbook, the faculty's participation in governance of the school through committees and the faculty senate reflects the degree of decision-making authority necessary to establish managerial status. The Petitioner asserts that authority for governance of the school rests with the Administration and that the participation of the faculty in academic governance is token, if not illusory. The parties stipulated at hearing that the deans of three of the four academic divisions, namely basic sciences, clinical sciences, and chiropractic health services, as well as the dean of student affairs, executive vice president/provost, director of admissions, and assistant director of research, are managers who should be excluded from the unit.³ There are approximately 34-36 faculty members in issue.

I have considered the evidence and the arguments presented by the parties on the issue. As discussed below, I have concluded that the faculty effectively creates policies and procedures used to govern the college through representation and participation in faculty committees, college-wide committees, and in the faculty senate. Thus, faculty members are managerial employees and do not qualify as employees within the meaning of the Act. Accordingly, I shall dismiss the petition.

To provide a context for discussion on this issue, I will first provide an overview of the organizational structure of the Employer. I will then discuss the roles of the faculty members

³ The Director of Admission teaches one course and is considered a member of the faculty. The Assistant Director of Research teaches a reduced course load and is considered a member of the faculty.

and their input into the governance of the college through participation in faculty committees, the college-wide committees, and the faculty senate. Next, I will provide my analysis, including a detailed discussion of the standard for determining managerial status and its application to the faculty of Sherman College. Finally, I will present my conclusions and findings on the issue presented.

I. Employer's Organizational Structure

A. Overview

The Sherman College of Straight Chiropractic (Sherman College) was founded in 1973 for the purpose of educating future doctors of chiropractic. Sherman College is accredited by the Southern Association of Colleges and Schools and the Council on Chiropractic Education, and is authorized to confer a Doctor of Chiropractic degree on each student who successfully completes a 3½-year course of studies. There are currently 376 students who are participating in a curriculum of basic sciences and clinical sciences. All courses are managed, directed, and taught solely by members of Sherman College.

Administratively, the College is governed by various administrators, including, the president, executive vice president/provost, vice-president for academic affairs, vice-president for business and finance, vice-president for institutional planning/assessment and enrollment, vice-president for institutional advancement, dean of chiropractic health services, dean of student affairs, and director of research.⁴ Academically, the College is organized into four divisions, namely, basic sciences, clinical sciences, the chiropractic health center, and the learning resources center. The deans of each of the four academic divisions supervise the faculty in each division.

⁴ The record does not address the status of the vice-director of academic affairs, business affairs, institutional planning/assessment and enrollment, institutional advancement, and the director of research.

The faculty handbook, which was introduced into evidence by the Employer, sets forth a compilation of board policies, college policies, and college procedures. The handbook contains a detailed description of the participation of the administration and the faculty in developing those policies and procedures through faculty and college-wide committees and through the faculty senate.

B. The Faculty

Faculty members teach courses in either the basic science or clinical science curriculum and provide supervision of health center interns in the care of patients. They develop the curriculum for the courses they are scheduled to teach based upon the course objectives as described in the college catalogue. Each faculty member selects the textbook to be used and prepares a syllabus that is submitted to the dean, who ensures that the syllabus contains the information specified in the college handbook and that the faculty member has not deviated from the course catalogue description. Within the syllabus, the faculty member can establish the basic calendar for the course and the exam schedule. Each faculty member chooses his or her own teaching methods within the realm of standardized teaching.

In addition to their teaching and clinical intern supervision duties, faculty members also serve on various faculty and college-wide committees, and on a faculty senate, where, as set forth below, they have input into Sherman College's policies and procedures.

The faculty do not have any decisional authority with regard to degree requirements, enrollment levels, faculty terminations, contract renewals for probationary faculty, faculty evaluations other than peer evaluations, filling of administrative positions, hiring of academic deans and other administrative officials, appointment of department or division chairpersons, or significant faculty benefit terms such as health insurance, pension, and 401(k) contribution plans.

In order to determine if the faculty members are managerial employees, I must examine whether their participation in the above-described committees and on the faculty senate gives them control over academic policies such that their interests are aligned with those of management. Thus, I will describe each committee, noting its purpose and the number of faculty members who serve on the committee and then I will discuss the faculty senate.

1. Faculty committees

Faculty committees are designed to offer faculty more direct involvement in decisions that impact the curriculum and faculty-specific issues. Faculty committees present all recommended policy changes to the faculty senate for review and vote. Following a vote by the faculty senate, proposed changes are then submitted either directly to the president, or through an administrative council to the president, who may choose either to accept or reject the recommendation; to refer the proposal to another committee for consideration; or to submit the proposal to the Board of Trustees for approval. The faculty handbook lists ten faculty committees, including, academic affairs, accommodation review, admission, curriculum review, faculty hiring, institutional effectiveness, library advisory, faculty affairs, research, and student affairs. Administrative and faculty members serve on each of these committees, with the exception of the accommodation review committee which is comprised only of administrative employees.⁵ The president serves as an ex-officio member of all committees. The number of faculty serving on each committee varies depending upon the nature of the committee and the expertise needed.

⁵ The accommodation review committee addresses college policy and procedures provided under Section 504 of the 1973 Rehabilitation Act and the Americans with Disability Act. The committee is composed of the dean of student affairs, the vice-president for academic affairs, the vice-president for enrollment, planning and assessment, the dean of chiropractic health services, the dean of basic sciences, and the dean of clinical sciences. Notwithstanding its classification as a faculty committee, no faculty members serve on the committee.

The academic affairs committee is composed of the vice president for academic affairs, the executive vice-president/provost, the deans of basic sciences, clinical science, and chiropractic health services, the director of learning resources, the registrar, a chiropractic health center representative, two faculty representatives elected by the faculty, and a student representative. The committee reviews and considers proposals relating to academic requirements, standards, policies and practices; encourages and provides counsel to faculty in the development of quality curriculum proposals; recommends changes in the curriculum; reviews annual reports from the deans of basic and clinical sciences regarding examination assessments of the courses and course syllabi; assists the vice president for academic affairs in establishing annual objectives for instruction and in facilitating the completion of said objectives; and reviews reports regarding the quality of instruction and reports the finding with recommendation to the faculty senate. When a course is designed or implemented, the academic affairs committee sets the number of credit hours assigned to the course. If the faculty member teaching the course disagrees with the hours assigned, he or she can petition the academic affairs committee to increase the course hours. Proposals and recommendations from this committee are sent to the faculty senate for review and recommendation, and then to the president for approval.

The admission committee considers admission policies and makes admission decisions. One faculty member serves on the admission committee along with the director of admission, the vice-president of reenrollment, planning and assessment, the vice-president for academic affairs, the dean of student affairs, the registrar, and one student representative. The committee meets eight to twelve times per year.

The curriculum review committee completes a curriculum review every four years and makes recommendations to the academic affairs committee regarding curriculum revisions. The committee is comprised of two faculty members along with the vice-president of academic affairs, the deans of basic and clinical sciences, the dean of chiropractic health services, the philosophy department chair, the registrar, the lead faculty doctor, the director of interns, and one student representative.

The faculty hiring committee reviews the credentials of applicants for faculty positions, interviews applicants, and approves or disapproves applicants for faculty appointments by majority vote, subject to final approval by the president of Sherman College. The committee also approves extension faculty for the supervision of externs. The committee makes its recommendations for hiring to the president. One faculty member serves on the faculty hiring committee along with the vice-president for academic affairs, the director of human resources, the executive vice-president/provost, the philosophy department chair, the dean of chiropractic health services, the deans of basic and clinical science, and one student representative. The committee members must be in agreement that the applicant is someone Sherman College would be interested in hiring. The president has not rejected any candidate for employment after receiving a recommendation from the committee.

The institutional effectiveness committee, also referred to as the outcomes assessment/quality management committee, collects, reviews, analyzes, evaluates, and prepares reports relating to data reflecting the assessment of the colleges' outcome. Three faculty representatives serve on this committee along with the vice-president of enrollment, planning and assessment, the vice-president of academic affairs, the executive vice-president/provost, the

dean of chiropractic health services, the deans of basic and clinical sciences, and the philosophy department chair.

The faculty affairs committee considers annual promotion applications from faculty members and reviews individual promotion applications. Three faculty members serve on this committee along with four administrative employees, including the deans of basic sciences, clinical science, and chiropractic health services. The committee also reviews policies and procedures concerning professional conduct and expectations of faculty, including workload, faculty benefits policies, and criteria for awarding bonus funds. Faculty members are initially hired at the rank of instructor or assistant professor. On an annual basis, a faculty member can apply for a promotion to assistant professor or professor. The College does not have tenure. The committee considers all suggestions for the improvement of the professional welfare of faculty members, and makes recommendations concerning such matters to the faculty senate. With regard to promotion issues, the deans, whether they agree with the committee's proposal or not, can provide information concerning their opinion regarding the applicant to the president. After the committee's recommendation is sent to the faculty senate, the matter is voted upon and submitted to the president for approval.

The research committee engages in all aspects of developing policies relating to research, encouraging research by the faculty, and procuring funds to support research. The committee is comprised of three faculty members, six administrative employees, and one student representative.

The student affairs committee makes recommendations to the faculty regarding orientation, graduation, student policies, and extracurricular student activities. The committee looks specifically at policies relating to students in the area of discipline and student conduct.

The committee is comprised of one faculty member, four administrative employees, and one student representative. The committee meets on an as-needed basis and each member of the committee has a vote.

The library advisory committee approves library policies and the purchase of library resources. Two faculty members and one student representative serve on the library advisory committee along with four administrative employees.

2. College-wide committees

The college-wide committees, which are designed to address items beyond the curriculum and/or faculty specific issues, include a broader representation of constituencies from across the campus. Policy proposals approved by these committees are submitted directly to the president who can either accept or reject the proposal, refer it to another committee, or submit the proposal to the Board of Trustees for approval. College-wide committees include the administrative council, equal opportunity, facilities planning, student conduct appeals board, information services, institutional review board, scholarship, and strategic planning. Although the composition of these committees is composed largely of administrative personnel, faculty members serve on three of the committees, including the administrative council, student conduct appeals board, and the scholarship committee. The administrative council committee serves in an advisory capacity to the president in the general administrative and financial affairs of the college. The scholarship committee, which includes six administrative employees and a student representative, meets once a quarter to consider scholarship applications and to vote, in accord with criteria established by the committee, on whether to award the scholarship. The student conduct board reviews charges and penalties given to students. If the Board disagrees with the disciplinary measure that has been given, the matter is submitted to the president for final

decision. Although there may have been times when the president has changed the given penalty within established parameters for a particular offense, the president usually follows the recommendation of the board.

3. Faculty Senate

The purpose of the faculty senate is to allow every faculty member to share responsibility for the determination of the college's educational policies. The faculty senate is comprised of the president, the executive vice president/provost, the vice-president for academic affairs, the dean of clinical sciences, the dean of chiropractic health services, the director of research, the librarians, and all full and part-time faculty members. In addition, the senate, through majority vote of its members, has granted membership with voting rights to the vice-president for institutional planning, assessment and enrollment, as well as the dean of student affairs and the registrar. The faculty senate, which is chaired by a president selected by the members, meets monthly to discuss and develop academic programs, policies, and procedures, and to work on the effective organization of the degree program. Although full-time faculty members are required to participate in the faculty senate and to regularly attend the senate's monthly meetings, normally only 75% of the faculty members are present at any given meeting.

The faculty senate has legislative powers to formulate policies, amend policies, and to enforce policies in all matters pertaining to admission, requirements for granting of degrees, certificates earned, curriculum instructions, educational policies, discipline of students, and conduct of faculty affairs. The faculty senate considers, discusses and debates any matter within its jurisdiction referred to it by the president, the vice-president of academic affairs, faculty or college committees, or members of the senate. An example of this debate process was provided concerning a proposal on a scheduled break that was presented to the senate in a recent spring

quarter. A proposal was made to the faculty senate to change the morning break time from 10:00 a.m. to 11:00 a.m. The faculty engaged in a detailed discussion of the matter and decided that if the break time was going to be changed, it should be changed to 12:00 noon for the convenience to those who did not come into the health center until 1:00 p.m. and because the break served as a fixed meeting time for committees. After the vote, the academic dean changed the time to 11:00 a.m. without any further input or vote by the faculty. The record does not establish who raised the break time issue at the faculty senate or whether the faculty's recommendation was sent to the president for approval.

After the faculty senate has discussed, debated, and developed particular policies or procedures, each member may vote. The faculty senate, based upon majority vote, can make recommendations to the president on any matter it considers. For example, if a faculty member is proposing a new course, the member would prepare a course syllabus, present it to the curriculum review committee, which would send it to the academic affairs committee. After passing through the academic affairs committee, the proposal would proceed to the faculty senate for debate, and then, if recommended by the senate, to the president for approval. Once the president receives a proposal from the faculty senate, the president has the option of either remanding the matter to a committee for further study, approving the matter submitted, or vetoing the proposal.

Other proposals are sent by the faculty senate to the president through the president's advisory body, the administrative council.⁶ For example, following requests by students to

⁶ The administrative council is composed of the president as chair, the executive vice-president/provost, who is also a faculty member, the vice-presidents of academic affairs, business and finance, enrollment services, institutional planning and assessments and institutional advancement, the deans of student affairs, continuing education, and chiropractic health services, the director of public relations and research, one elected faculty member, and a student member.

change the grading scale, a proposal was first reviewed by the academic affairs committee, which voted on the matter and made a recommendation to the faculty senate. The faculty senate approved the proposal and sent it for approval to the administrative council and to the president.

During the past two years, the faculty senate has acted to adopt or to revise approximately thirty policies establishing rules, regulations, and criteria that must be adhered to and met by students. The president approved each of the faculty senate's recommended policy changes. After the president granted his approval, his secretary updated the policy book and distributed the update to the college constituency. Although the president and the Board of Trustees have veto power, during the preceding five years, the president has never vetoed or rejected a senate proposal. The record does not contain any evidence as to whether the Board of Trustees has ever voted to veto any proposed policy changes submitted by the faculty senate.

II. Analysis

The Board and courts have defined managerial employees as those “who formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *NLRB v. Yeshiva University*, 444 U.S. 672, 100 S.Ct. 856 (1980) quoting *NLRB v. Bell Aerospace Co.*, 416 U. S. 267 at 288, 94 S. Ct. 1757 (1974). These employees “must exercise discretion within, or even independently of, established employer policy and must be aligned with management” and they must represent “management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *Yeshiva*, 444 U. S. at 683. Managerial employees have been excluded from coverage of the Act based upon the policy determination that members of management would pose a conflict of interest if they were permitted to engage in collective bargaining. In *Yeshiva University*, the Supreme Court found that the faculty were managerial employees because they possessed total

and absolute control over academic matters including curriculum, grading systems, admissions and matriculation standards, academic calendars, teaching methods, course schedules, and in some instances, tuition, the size of the student body, and the location of the school. Outside of academic affairs, the faculty in *Yeshiva* "effectively" determined faculty hiring, tenure, sabbaticals, terminations, and promotions.

In applying the *Yeshiva* standard in subsequent cases, the Board, has recognized that, “[t]he ‘business’ of a university is education, and its vitality ultimately must depend on the academic policies that largely are formulated and generally are implemented by faculty governance decisions.” *University of Dubuque*, 289 NLRB 349, 353 (1988). Given the nature of the “business” the Board examines the facts in each case in search of where “the power to control the administration of the university” lies. *Boston University*, 281 NLRB 798, 800 (1986).

In *University of Dubuque*, the Board found that faculty members were managerial employees in light of their participation, as a whole and as members of various committees, in the formulation of academic policy that aligns their interest with that of management. Specifically, the Board found that faculty members set student grading and classroom conduct standards; established degree requirements; recommended earned-degree recipients; initially receive and consider new degree programs; developed, recommended, and ultimately approved curricular content and course offerings; and participated on various committees to effectively recommend course schedules, admission standards, student retention, distribution of financial aid to students and modification of programs or departments. 289 NLRB at 352.

In *Boston University*, *supra*, 281 NLRB at 798, the Board adopted the Administrative Law Judge’s finding that the department chairman and the full-time faculty at Boston University are managerial employees under the *Yeshiva* standard. The Board noted that the faculty has

absolute authority over such matters as grading, teaching methods, graduation requirements, and student discipline; the faculty was the moving force and almost always effectively controlled matriculation requirements, curriculum, academic calendars, and course schedules; and the faculty played an effective and determinative role in recommending faculty hiring, tenure, promotions, and reappointments.

In *Livingstone College*, 286 NLRB 1308, 1313 (1987), the Board found that the faculty members were managerial employees as they exercised almost plenary control over curriculum and academic policy, particularly by virtue of the faculty-wide vote over proposals and recommendations made by the various standing committees. The Board emphasized the importance of faculty control or effective control over academic areas, as opposed to non-academic areas. *Id.* at 1314. Most recently, in *Lemoyne-Owen College*, 345 NLRB No. 93 (September 30, 2005), the Board, in reversing the decision of the regional director, found that faculty members, who served on standing committees and in a faculty assembly along with administrative employees, were managerial because they made or effectively made recommendations in the majority of critical areas identified in *Yeshiva*.

When participation of faculty members in setting policy is not effective, however, the Board will find that the faculty members are not managerial employees. For instance, in *St. Thomas University*, 298 NLRB 280 (1990), the Board found that faculty members were not managerial employees because the main vehicle for faculty participation in decision-making was on a faculty forum whose recommendations were not effective and, the faculty lacked representation on the only committee that had substantial influence on university policy. In *Loretto Heights*, 264 NLRB 1107 (1982) *enfd.* 742 F.2d. 1245 (10th Cir. 1984), the Board found that although faculty members served on faculty-dominated committees, the committee

recommendations were not effective in light of the large number of administrative staff who created a buffer between top management and the faculty, thus eliminating the need for advice, recommendations, and the establishment and implementation of policy.

In the present case, through committee participation and the faculty senate, the Sherman College faculty has substantial input into the academic policies of the college. In this regard, they are represented on committees that formulate policies relating to academic requirements, standards, policies and practices; curriculum; admission policies; faculty evaluation and promotion processes; faculty remuneration and benefits; faculty hiring; research policies; scholarship awards; and development of long range goals for Sherman College. Although faculty members are in the minority on these committees, they are in the majority on the faculty senate which ultimately considers, discusses, and debates all policy decisions generated by the committees, the president, or individual faculty members.

The Petitioner asserts that because the faculty and college-wide committees are comprised of administrative and faculty representatives with the faculty being in the minority, the faculty's input is ineffective and the true decision-making authority at Sherman College lies with the administration. The Petitioner cites *University of Great Falls*, 325 NLRB 83 (1997), in which the Board affirmed the regional director's determination that the faculty were not managers based on the proposition that "decisions or recommendations made by committees only a minority of whose members consist of faculty representatives cannot be said to be faculty decisions or recommendations." *Id.* at 95. The Board affirmed the decision of the regional director that the employer failed to meet its burden of demonstrating that non-dean faculty exercise managerial authority as contemplated under *Yeshiva* and subsequent Board cases. *Id.* at 97. Specifically, the regional director found that the record failed to establish that faculty-

dominated committees effectively recommended or otherwise exercised managerial authority. In this regard, the record was vague or silent on whether the committee's recommendations were generally and routinely approved by the administration or whether the recommendations were independently reviewed and evaluated by higher administrators. *Id.* at 95.

In the present case, the decisions and recommendations made by the faculty and college-wide committees are only the beginning of the policy-making process. Following debate in committee, the proposals proceed to the faculty senate where faculty members represent a majority. The faculty senate ultimately hears, considers, discusses, debates, and votes, with majority rule, on all proposals coming out of committee. Unlike the faculty in *Great Falls*, the entire faculty of Sherman College, in addition to serving on committees, is required to participate in the faculty senate. Moreover, the policy recommendations of the faculty senate in the last five years have been consistently approved and adopted by the president. Recommendations of the faculty are not ineffective simply because administrators served with faculty on standing committees and in the faculty assembly. *Lemoyne-Owen College*, *supra* 345 NLRB No. 93, slip op. at 9. Thus, I find that, through participation on the committees and through the faculty senate, the Sherman College faculty has effective control over academic policies and procedures and is aligned with management.

III. Conclusions and Findings

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) (7) of the Act for the reasons set out above.

IV. Order

IT IS HEREBY ORDERED that the petition herein be, and it hereby is, dismissed.

V. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N. W., Washington, D. C. 20570. This request must be received by the Board in Washington by December 7, 2005. The request may not be filed by facsimile.

Dated at Winston-Salem, North Carolina, on the 23rd day of November, 2005.

/s/ Willie L. Clark, Jr.
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